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SUPREME COURT OF THE UNITED STATES

October Term, 1995

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WILLIAM T. BURGMEIER,
PATRICK G. BURGMEIER,
B & P LIVING TRUST,

Petitioners,

v.

AGRIBANK, FCB, f/k/a
Federal Land Bank of St. Paul,

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Paul Christopher Engh
Attorney for Burgmeiers
Attorney Registration No. 134685
1600 Foshay Tower
821 Marquette Avenue
Minneapolis, MN 55420-2919
(612) 298-9462

Of Counsel:
Lawrence H. Crosby
Attorney Registration No. 192788
Crosby & Associates
25 Empire Drive
St. Paul
Minnesota 55103
(612) 298-9462

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## QUESTION PRESENTED FOR REVIEW

Whether res judicata or collateral estoppel or due process considerations preclude a mortgagee from conducting a third foreclosure by advertisement where the legal efficacy of each of the other previous foreclosures has been judicially litigated and every lawsuit resulted in a decision in favor of the mortgagor?

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## OPINIONS BELOW

This Petition seeks review of the Order of the Supreme Court of the State of Minnesota, declining review, William T. Burgmeier, Patrick G. Burgmeier, B & P Living Trust, Appellants, vs. AgriBank, FCB, f/k/a Federal Land Bank of St. Paul, C5-94-1381, and the underlying unpublished opinion from the Minnesota Court of Appeals under the same case caption and appellate case. Each of these decisions as well as the trial court decision has been reprinted in the Appendix.

## STATEMENT OF JURISDICTION

Petitioners seek review of the previously-identified decision of the Minnesota Court of Appeals, filed January 17, 1995, and the subsequent denial of review by the Minnesota Supreme Court, dated March 14, 1995.

This United States Supreme Court has

jurisdiction based on 28 U.S.C., Section 1257.

## STATEMENT OF THE CASE

The present case first came to the Minnesota Court of Appeals from Kandiyohi County District court after an adjudication on a motion for summary judgment. The Court of Appeals held that a foreclosure by advertisement which has been judicially avoided does not act to bar a subsequent foreclosure by advertisement.

## STATEMENT OF FACTS

The Federal Land Bank of St. Paul held a mortgage on real property owned by the Burgmeier family. Burgmeiers defaulted during the farm crisis. On November 24, 1987, Federal Land Bank of St. Paul initiated a court proceeding to obtain service by publication against Burgmeiers, Federal Land Bank of St.

Paul, a corporation, v. William T. Burgmeier et al., Court File C4-87-1088. A foreclosure by action ensued.

A full year later, on November 30, 1988, Farm Credit Bank of St. Paul, successor to The Federal Land Bank of St. Paul, brought a declaratory judgment action self-characterized as a "mortgage foreclosure" to determine whether title to the Burgmeier property had become vested in the Federal Land Bank, Farm Credit Bank of St. Paul, formerly The Federal Land Bank of Saint Paul, v. Wm. T. Burgmeier et al., Court File No. C-88-1204. These two actions were consolidated; Farm Credit Bank had judgment entered against itself for the Bank's failure to serve Patrick Burgmeier with a copy of the summons and complaint. Conclusion of Law No. 8, from the Findings of Fact, Conclusions of Law,

Order for Judgment and Memorandum in the consolidated cases, states that "[t]he mortgage foreclosure sale of April 18, 1989, is void for failure to comply with notice requirements of [Minnesota Statutes Section] 580.03,...582.041, and ...582.042."

Farm Credit Bank of St. Paul attempted another foreclosure, again by advertisement, against the Burgmeiers. Burgmeiers sued, Wm. T. Burgmeier et al. v. Farm Credit Bank of St. Paul, Court File No. C4-90-1313, Amended Complaint, attacking the foreclosure for the Bank's refusal to give the Burgmeiers rights conferred on them by the federal Agricultural Credit Act, 11 U.S.C. Section 2202. The trial court found against the Burgmeiers in a preliminary judgment dated June 18, 1992, and an Order for Entry of Final Judgment and

Judgment, filed October 2, 1992. The judgment did not stand: The Minnesota Court of Appeals reversed, Appellate Case No. C2-92-1804, holding that Burgmeiers could raise the Bank's having refused to offer the Burgmeiers their federally-protected restructuring rights as an affirmative defense. The Court of Appeals decision held that "[t]he failure of [Farm Credit Bank] to afford restructuring opportunities to [Burgmeier] before commencing the second foreclosure action provides a defense. The foreclosure sale must be voided." The Minnesota Supreme Court denied the bank's Petition for Review.

AgriBank, the latest successor to Federal Land Bank, initiated another foreclosure by advertisement, the foreclosure which is the subject of this Petition for a Writ of Certiorari.

Burgmeiers commenced this latest lawsuit, raising the defenses of res judicata and collateral estoppel, but the Courts of Minnesota have not provided relief.

## ARGUMENT

Whether res judicata or collateral estoppel or due process considerations preclude a mortgagee from conducting a third foreclosure by advertisement where the legal efficacy of each of the other previous foreclosures has been judicially litigated and every lawsuit resulted in a decision in favor of the mortgagor?

Simply put, how many times may a mortgagee attempt and fail to properly foreclose its mortgage on real property?

If the foreclosure were by action, the answer would be "one," given that only a single resort to a court would be permitted. In Minnesota, if the foreclosure is by advertisement, the mortgagee may attempt foreclosure repeatedly even under circumstances where

the legality of the foreclosure has been questioned by bringing the matter to court for judicial review. Previous judicial intervention means nothing; another foreclosure may follow apace. Such a posture is wholly inconsistent with res judicata, collateral estoppel, and due process.

The inherent contradiction in the law now brought to the United States Supreme Court becomes clear, using Minnesota law as the touchstone: In Scott-Peabody & Associates v. Northern Leasing Corporation et al., 140 N.W.2d 614, 616 (Minn. 1966), the Minnesota Supreme Court stated that

> It is well established that a judgment in an action to quiet title bars subsequent litigation on the same parties or their privies, and is final and conclusive not only as to all issues actually involved and determined but also as to such matters as might have been

litigated and determined. The Youngstown Mines Corp. v. Prout, 266 Minn. 450, 124 N.W.2d 328; Veline v. Dahlquist, 64 Minn. 119, 66 N.W. 141.

Twice the Burgmeier-Farm Credit Bank actions resulted in judgments in favor of William Burgmeier, voiding foreclosures by advertisement. Normally, once a person has had judicial consideration of a claim, the matter ends. There are no second bites at the apple. But in the process of foreclosure by advertisement an unfavorable decision by a trial court has no consequences to the mortgagee other than the bother of initiating the foreclosure again.

In the present Burgmeier action, the trial court entered judgment against Farm Credit Bank in a declaratory judgment action where the Bank asked to have the trial court determine whether the Bank

had gotten title after a foreclosure by advertisement.

"A judgment on the merits constitutes an absolute bar to a second action for the same cause of action, and is conclusive between parties and privies * * *." Mattsen v. Packman, 358 N.W.2d 48, 49 (Minn. 1984). See also Erickson v. Nelson, 146 N.W.2d 768 (Minn. 1966).

In Holiday Acres No. 3 v. Midwest Federal Savings and Loan Ass'n of Minneapolis, 271 N.W.2d 445 (Minn. 1978), the Minnesota Supreme Court indicated:

> The concept of justiciability comprehends the fundamental requirements for judicial action. As we stated in Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 281, 290 N.W. 802, 804 (1940):
>
> > "* * * The controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal

> relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * *"

The controversy between Farm Credit Bank and the Burgmeier family concerned a mortgage foreclosure. It would have been prudent for Farm Credit Bank to have its facts in order and to follow the requisite provisions to obtain a valid foreclosure.

Sound policy reasons undergird the legal doctrine of res judicata: "...Interest in avoiding unnecessary litigation, the economy of judicial time, and the public policy favoring the establishment of certainty in legal relations. * * * Res judicata was

designed to eliminate the expense, vexation, waste and possible inconsistent results of duplicitous litigation." Wessling v. Johnson, 424 N.W.2d 795, 799 (Minn. Ct. App. 1984).

Burgmeiers have now been either forced into court by Farm Credit Bank or Burgmeiers have had to ask the Court to void Farm Credit's illegitimate foreclosures four times. Each time the same cause of action has been at issue (the propriety of a mortgage foreclosure); each time the same parties have appeared (now William Burgmeier standing alone since his wife has died); each time the same evidence will sustain the actions (the Burgmeiers' previous judgments in their favor have continuing force). McMenomy v. Ryden, 148 N.W.2d 804, 806 (Minn. 1958).

The cases cited by Farm Credit Bank,

now AgriBank, and by the Minnesota Court of Appeals, for the proposition that a mortgage foreclosure by advertisement may be conducted repeatedly cannot be sound law. In Sheasgreen Holding Company v. Dworsky, 233 N.W. 853 (Minn. 1930), the appellant argued that the "pendency of the former action should be held a bar to the second foreclosure proceeding." The holding company had initiated a second, proper foreclosure by advertisement while the parties were contesting in court the first foreclosure. The reviewing Court went on:

> It was long ago definitely decided that a void foreclosure sale will not prevent a second and valid foreclosure proceeding. The first attempt being null, and therefore amounting to nothing, imposes no obstacle to the second proceeding. Bottineau v. Aetna Life Insurance Company, 31 Minn. 125, 16 N.W. 849.

What distinguishes Sheasgreen

Holding Company from the present Burgmeier case is the fact that the foreclosures by advertisement in Burgmeier were voided by the courts. Sheasgreen notes that the first foreclosure attempt had been "void"; and that this first attempt at foreclosure had been "null, ...amounting to nothing."

In Bottineau, op. cit., the Court determined that a previous, and "utterly null" attempt to foreclose a mortgage, again by advertisement, did not preclude a second, valid foreclosure by advertisement.

A district court (or the Minnesota Court of Appeals) voided the previous foreclosures by advertisement in Burgmeier. The foreclosures by advertisement would have conveyed the property to Farm Credit Bank if not for the Burgmeiers' judicial resistance. In

Burgmeier the improper foreclosures were merely voidable. See Short v. Sun Newspapers, Inc., 300 N.W.2d 781, 788 (Minn. 1978).

The trial court in the present action subsumed the void/voidable distinction when Judge Allen Buchanan maintains that what has been "adjudged void" must be "considered void." But the two expressions differ: Some matters are void ab initio; others are only capable of being rendered void by a judicial act.

The Minnesota Court of Appeals suggests that the law allows repeated efforts to foreclose a mortgage by advertisement and that a failed attempt may be followed by another failed attempt. After all, at some point a legal foreclosure might occur. Such a position is absurd. Principles of finality require that there be an end to

the enormous long-term disruption that any foreclosure precipitates.

In any other legal matter, the Bank would have its day in court, a possible appeal, and nothing more. The rule bandied about by the Court of Appeals cannot be the law; if it is actually the present stance of the law, this law cannot be permitted to stand.

In this case, Burgmeier had the first foreclosure by advertisement adjudged ineffective and illegal; the Minnesota Court of Appeals, acting properly, voided the second foreclosure by advertisement. Each case involved the entry of a final judgment. Even if the first action were dismissed without prejudice (which action was <u>not</u> dismissed without prejudice!), the second loss, the loss dealt by the Minnesota Court of Appeals should have conclusively ended

the matter in favor of Burgmeier.

The rule is clear with respect to any other litigation, a second dismissal, even one without prejudice, acts to bar further litigation on the same issue between the same parties.

A rule which permits a bank to foreclose by advertisement repeatedly even where a trial court's powers have been invoked cannot be reconciled with the consistent rule that a person has, under most circumstances, a single opportunity to have a lower court entertain his suit.

Allowing the latest Minnesota Court of Appeals' decision to stand signals all lenders in Minnesota, all mortgagees, that there is no reason to fully conform to the law pertaining to foreclosure by advertisement. In most cases, a haphazard or even a patently unlawful

foreclosure effectuates the mortgagee's will and neither would result in any consequences to the lender. Another foreclosure by advertisement would follow. And others, if necessary. After all, one whose interest has been foreclosed would have little reason to ask a court to void even an improper foreclosure where another equally illegal foreclosure might follow as a matter of course.

But such a process explicitly negates any sense of due process as constitutionally required.

Other jurisdictions which allow a power of sale in a mortgage to proceed as a foreclosure by advertisement still require judicial review to confirm any such sale. Colorado and Nebraska are two states which offer such judicial protection. Minnesota has no such due

process protections in place.

Given that Minnesota does not have such protection in place, a determination by this Supreme Court that a second judicially-voided foreclosure by advertisement becomes final and acts as res judicata to further enforcement of the mortgage would be appropriate and just.

## CONCLUSION

This United States Supreme Court ought to declare that a second judicially-avoided foreclosure by advertisement where judgments have been entered related to the same mortgage cannot be followed by a third attempt on account of res judicata, collateral estoppel, and due process considerations.

The Writ for Certiorari should issue.

Dated at Minneapolis, Minnesota,

this 8th day of June, 1995.

Paul Engh
Attorney for Burgmeiers
Attorney Reg. No 134685
1600 Foshay Tower
821 Marquette Avenue
Minneapolis
Minnesota 55402-2919
(612) 335-3700

OF COUNSEL:
CROSBY & ASSOCIATES
Lawrence H. Crosby
Attorney Reg. No. 192788
25 Empire Drive
St. Paul
Minnesota 55103-1800
(612) 298-9462

STATE OF MINNESOTA

IN SUPREME COURT

C5-94-1381

William T. Burgmeier, Patrick G. Burgmeier, B & P Living Trust,

Appellants,

vs.

Agribank, FCB, f/k/a Federal Land Bank of St. Paul,

Respondent.

O R D E R

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of William T. and Patrick G. Burgmeier for further review be, and the same is, denied.

Dated: March 14, 1995

BY THE COURT:

Chief Justice

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. @ 480A.08, subd. 3 (1992).

**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

**C5-94-1381**

Kandiyohi County
Dist. Ct. #C94188

William T. Burgmeier,
Patrick G. Burgmeier, and
B & P Living Trust,
Appellants,

vs.

Agribank, FCB, f/k/a
Federal Land Bank of St. Paul,
Respondent.

Lawrence H. Crosby
Crosby & Associates
25 Empire Drive
St. Paul, MN 55103-1800

Jeff C. Braegelmann
Gislason, Dosland, Hunter
& Malecki
One South State Street
PO Box 458
New Ulm, MN 56073

Filed January 17, 1995
Office of Appellate Courts

Considered and decided by Peterson,
Presiding Judge, Norton, Judge, and

Short, Judge.

U N P U B L I S H E D  O P I N I O N

**NORTON**, Judge

After respondent instituted foreclosure proceedings and a foreclosure sale occurred, appellants brought this action challenging the validity of the sale. Appellants claimed res judicata and collateral estoppel precluded respondent from foreclosing by advertisement. Respondent moved for summary judgment, for costs pursuant to Minn. Stat. § 549.21 (1992), and for sanctions pursuant to Minn. R. Civ. P. 11. The district Court granted respondent's summary judgment motion, but denied respondent's motion for costs and sanctions. We affirm.

**FACTS**

In 1979, appellant William Burgmeier' and his wife (now deceased) executed a

mortgage to the Federal Land Bank of St. Paul, the predecessor of respondent Agribank, FCB. Thereafter, appellants defaulted on the mortgage and respondent instituted foreclosure proceedings in 1987 (the first foreclosure). Unable to personally serve appellants, respondent sought permission in district court to substitute service by publication. The district court issued an order allowing service by published notice.

After the foreclosure sale, respondent brought a declaratory judgment to determine the validity of the sale. The district court voided the sale for failure to comply with notice requirements.

Respondent subsequently commenced foreclosure proceedings again (the second foreclosure). Following another

foreclosure sale, appellants brought suit challenging the validity of the sale. The district court upheld the validity of the sale. This court later reversed the district court, voiding the sale. Burgmeier v. Farm Credit Bank of St. Paul, 499 N.W.2d 43 (Minn. App. 1993), pet. for rev. denied (Minn. July 15, 1993).

Respondent again instituted foreclosures proceedings and another foreclosure sale occurred (the third foreclosure). Appellants then instituted the current action challenging the validity of the sale alleging, among other



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[1] In this action, William Burgmeier is an appellant, along with his son, Patrick Burgmeier, and B & P Living Trust, a registered trust under the laws of Minnesota. For the purposes of this opinion, they will collectively be referred to as appellants.

things, res judicata and collateral estoppel.

Respondent moved for summary judgment. Respondent also moved for costs pursuant to Minn. Stat. § 549.21 (1992) and for sanctions pursuant to Minn. R. Civ. P. 11. The district court granted respondent's summary judgment motion, concluding that the first foreclosure and the second foreclosure were not foreclosures by action. In addition, the district court denied respondent's motion for costs and sanctions.

## D E C I S I O N

Appellant challenges the district court's granting of respondent's summary judgment motion.

> On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is to be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

Appellants assert that some of respondent's prior attempts at foreclosure should be characterized as foreclosure by action. Under Minnesota law, there are two types of mortgage foreclosure proceedings: (1) foreclosure by advertisement, which occurs without recourse to the courts; and (2) foreclosure by action, which requires a decree from the court as well as judicial approval of the sale. Norwest Bank Hastings Nat'l Ass'n v. Franzmeier, 355 N.W.2d 431, 433 (Minn. App. 1984).

Appellants contend that respondent has initiated four separate foreclosure

proceedings, two of which should be characterized as foreclosures by action. Specifically, appellant claims that respondent converted the first foreclosure into two separate foreclosures by action when respondent sought the district court's review of certain issues. We disagree.

The first foreclosure was not a foreclosure by action. Respondent was not seeking "a judicial decree and approval of sale." Franzmeier, 355 N.W.2d at 433. The district court did not order the first foreclosure sale, no foreclosure judgment was rendered before the sale took place, nor did the district court supervise the sale.

Seeking a declaratory judgment that the first sale was valid did not convert the proceeding into a foreclosure by action. The sole purpose of the

declaratory judgment action was to determine the validity of the first sale. Therefore, the first foreclosure took place "without recourse to the courts." Franzmeier, 355 N.W.2d at 433.

Appellants argue that respondent should be precluded by collateral estoppel and res judicata from foreclosing by advertisement. The district court concluded that the previous actions in district court voided the prior sales, but not the mortgage itself. We agree. Thus, collateral estoppel and res judicata did not preclude respondent from bringing another foreclosure by advertisement pursuant to the power of sale clause contained in the mortgage. See Lindgren v. Lindgren, 73 Minn. 90, 98, 75 N.W. 1034, 1036 (1898) ("It is the law that a void foreclosure does not discharge the lien of the mortgage."); Bottineau v.

Aetna Life Ins. Co., 31 Minn. 125, 126, 16 N.W. 849, 849 (1883) (holding that a void foreclosure sale will not prevent a second and valid foreclosure proceeding); see also Gerdin v. Princeton State Bank, 384 N.W.2d 868, 872 n.7 (Minn. 1986) (citing Bottineau for the proposition that "a void foreclosure sale does not prevent a second attempt").

Appellants attempt to distinguish between sales that are void from the beginning and those that are merely voidable. The distinction, however, is irrelevant here. In either case, the result is the same: the sale is set aside and the mortgage itself remains "as if it had never been foreclosed." Lindgren, 73 Minn. at 98, 75 N.W. at 1036. The previous judgments did nothing to alter the mortgage itself; rather, the previous judgments dealt only with procedural

issues and, thus, only with the validity of the particular sales.

Respondent asserts that costs and sanctions are appropriate under Minn. Stat. § 549.21, subd. 2 (1992) and Minn. R. Civ. P. 11. The standard of review of decisions on fees and costs pursuant to both Minn. Stat. § 549.21 and Minn. R. Civ. P. 11 is abuse of discretion. Uselman v. Uselman, 464 N.W.2d 130, 141, 145 (Minn. 1990).

Given the policy of construing the rules narrowly, we cannot say the trial court abused its discretion in refusing to award respondent costs and sanctions. See Uselman, 464 N.W.2d at 142 ("[Rule 11 should be construed somewhat narrowly - while some sanctionable conduct might under these circumstances escape discipline, that is preferable to deterring legitimate or arguably

legitimate claims").

**Affirmed.**

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF KANDIYOHI 8TH JUDICIAL DISTRICT

File No. CX-94-0188

William T. Burgmeier,
Patrick G. Burgmeier,
B & P Living Trust,

Plaintiffs,

v.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT**

Agribank, FCB, f/k/a Federal Land Bank of St. Paul,

Defendant.

This matter came before the undersigned for hearing on April 29, 1994 at 10:15 a.m. upon Defendant's Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. Defendant was represented by Jeff Braegelmann, New Ulm, Minnesota 56073-0458. Plaintiff was represented by Lawrence H. Crosby, St. Paul, Minnesota 55103-1800.

The facts of this case are undisputed. The Plaintiffs appended their

complaint with portions of prior lawsuits concerning previous foreclosure attempts (Court Files CX-88-1204, C4-87-1088, C4-90-1313 (Court of Appeals case no. C2-92-1804)). This Court was able to discern the facts through careful review of Plaintiffs, exhibits and the court files to which the Plaintiff refers. Plaintiffs do not dispute the facts found in the previous cases, nor do they raise any issue of fact concerning the current foreclosure.

**UNDISPUTED FACTS**

1. Plaintiffs William T. Burgmeier and Patrick G. Burgmeier are individuals residing in Kandiyohi County, Minnesota. Plaintiff B & P Living Trust is alleged to be a registered trust under the laws of Minnesota. Plaintiffs claim an interest in real estate situated in Kandiyohi

County, Minnesota (hereinafter "the Subject real estate"), which is described as:

S1/2 NW1/4;
Also Government Lots 2, 3, 5 and 6; All in Section 34;
Also Government Lot 6;
Also Lot No. 1 of Subdivision of Government Lots 4 and 5 described as : Commencing 20 chains East and 72 links South from meander post no. 12, giong North 2 degrees 22 minutes; thence North 55 degrees East 7 chains, thence East 3 chains; thence North 85 degrees East 6.75 chains; thence South 55 degrees East 2 chains; thence South 52 degrees West 4.25 chains; thence South 22 degrees East 3.23 chains; thence South 83 degrees East 11.86 chains; thence North 3 degrees West 7 chains; thence North 84 degrees West 11.20 chains; thence South 59 degrees West 5.15 chains; thence North 73 degrees West 6 chains; thence North 56 degrees, 1.78 chains to place of beginning, EXCEPT a tract of land 13 rods square containing 1 acre in the Southeast corner of the last above tract, the said I acre tract to extend to meander line on the South which excepted parcel is described in Volume 45 Deeds 186; EXCEPT an unsurveyed island in Lot 6;
All in Section 35;

All in Township 119 North, Range 34 West;

Subject to existing highways, easements and rights of way of record.

2. Defendant Agribank, FCB (hereinafter Agribank) was formerly known as Farm Credit Bank of St. Paul and formerly known as The Federal Land Bank of St. Paul.

3. Agribank holds a real estate mortgage which was executed on September 27, 1979, by William T. and Rita Franks Burgmeier, as security for a $195,000 loan from Agribank. The mortgage was recorded in the office of the Kandiyohi County Recorder on October 3, 1979, at Microfilm No. 9123, Document No. 273341.

4. The Burgmeiers defaulted on the loan in 1987, prompting Agribank to commence foreclosure proceedings in October 1987. Agribank was unable to

personally serve the Burgmeiers with notice of the foreclosure sale despite diligent attempts to make service. Agribank therefore sought permission in District Court to effect service by publication. The Court issued an order upon the unanswered complaint and summons, in Kandiyohi County Court file number C4-87-1088, allowing service of process by three weeks published notice. After several sale date changes and continued published notice of the revisions, the sale occurred on April 18, 1988.

5. Agribank brought a declaratory judgment action, in Kandiyohi County Court file number CX-88-1204, to determine the validity of the sale. The Court voided the sale for failure to comply with notice requirements, because Patrick Burgmeier was entitled to personal service of foreclosure notice as occupant of and

person in possession of a separate dwelling on the mortgaged property.

6. Agribank once again commenced foreclosure proceedings. The second sale occurred on February 28, 1990. The Burgmeiers brought suit challenging the validity of the second sale in Kandiyohi County Court file number C4-90-1313. The District Court upheld the validity of the sale. The Burgmeiers appealed and the Court of Appeals reversed the District court, voiding the sale on the grounds that the Defendant did not send the Burgmeiers the proper pre-foreclosure restructuring notices as required by the Farm Credit Act.

7. Agribank conducted a third foreclosure sale on February 22, 1994 Plaintiffs William and Patrick Burgmeier, father and son, and B & P Living Trust brought the current action challenging the

validity and legality of the third sale (the current sale) solely on the grounds of res judicata and collateral estoppel, hardship, and public interest.

8. Plaintiffs allege no defects in the mortgage or with regards to the current foreclosure sale. The mortgage continues to be in default and no payment has been made since November of 1985.

**CONCLUSIONS OF LAW**

1. Kandiyohi County Court file number C4-87-1088 consists of a summons and complaint, and a court order allowing the Plaintiff/mortgagee (Agribank) to substitute service by publication for personal service in the first foreclosure sale.

2. Kandiyohi County Court file number CX-88-1204 contains a declaratory judgment action brought by the Plaintiff/mortgagee (Agribank) to

determine the validity of the foreclosure sale which was held on April 18, 1988. The sale was held to be invalid for inadequate notice.

3. The April 18, 1988 foreclosure sale was held pursuant to proceedings in Foreclosure by Advertisement commenced by the mortgagee (Agribank). Court files C4-87-1088 and CX-88-1204 did not contain records of proceedings in Foreclosure by Action.

4. Kandiyohi County Court file number C4-90-1313 contains a lawsuit brought by the Plaintiff/mortgagor (Burgmeiers) to void a foreclosure sale of the disputed property which took place on February 28, 1990.

5 The February 28, 1990 foreclosure sale was held pursuant to proceedings in Foreclosure by Advertisement commenced by the mortgagee

(Agribank). Court file C4-90-1313 does not contain records of proceedings in Foreclosure by Action.

6. The prior actions documented in Kandiyohi County Court files CX-88-1204, and C4-90-1313 voided the prior foreclosure sales, but did not void the mortgage itself. The principles of Res Judicata and Collateral Estoppel do not preclude Agribank from exercising the power of sale contained in the mortgage.

7. The debt secured by the mortgage remains unsatisfied. The public interest would not be served by precluding a mortgagee from foreclosing upon a mortgage which is in default. Hardship is not a basis to void a foreclosure sale.

8. There are no genuine issues of material fact and Agribank, FCB is entitled to judgment as a matter of law on the merits of the case and with prejudice.

**IT IS HEREBY ORDERED** that judgment be entered for the Defendant, Agribank, FCB, on the merits and with prejudice.

**IT IS FURTHER ORDERED** that Defendant, Agribank, FCB, is awarded its costs and disbursements herein.

**IT IS FURTHER ORDERED** that Defendant's motion for costs pursuant to Minn. Stat. 549.21 (1992) and for sanctions pursuant to Minn. R. Civil P. 11 (1992) is denied.

**LET JUDGMENT BE ENTERED IMMEDIATELY.**

Dated this 17 day of May, 1994.

Allan D. Bidchanan
Judge of District Court

COURT MEMORANDUM

Defendant made a motion that Plaintiffs' Complaint be dismissed on its merits with prejudice on the grounds that it fails to state a claim upon which relief can be granted, pursuant. to Minn. R. Civil P. 12.03. Alternatively, Defendant requests Summary Judgment, pursuant to Minn. R. Civil P. 56, because there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

Plaintiffs do not allege any disputed facts. Rather, Plaintiffs argue about the characterization of the facts, which is a legal question. If the prior foreclosure sales attempted by the Defendant are characterized as "foreclosures by action", any subsequent litigation is barred by the principles of Res Judicata and Collateral Estoppel. On

the other hand, if the sales were "foreclosures by advertisement", the principles do not apply since there is no final adjudication on all of the issues in a proceeding in "foreclosure by advertisement".

## I. CLASSIFICATION OF THE PREVIOUS FORECLOSURES

Plaintiffs claim that the current foreclosure sale was barred by the principle of res judicata. The basis of Plaintiffs' claim is that at least one of the two prior attempts of the Defendant to foreclose the mortgage constituted a "foreclosure by action" which resulted in an adjudication on the merits.

"Foreclosure by action", also known as "judicial foreclosure", is affected through service of process upon all necessary parties, formal pleadings, a

judicial trial and judgment, a court-supervised foreclosure sale, and a possible deficiency proceeding. This type of proceeding is used when there is no power of sale clause in the mortgage or deed, if there are defects in the mortgage, or when there are multiple liens an the property and their priority is disputed. A final judgment on the merits in a foreclosure by action bars any subsequent litigation involving the same issues. See Minn. Stat. SS 581.01-12 (1992).

"Foreclosure by advertisement", also known as "power of sale foreclosure", is used when the mortgage contains a power of sale clause. After notice, the mortgaged real estate is sold at a public sale. The proceeds are used to pay the mortgagee. Surplus is given back to the mortgagor. This method is significantly

less costly than foreclosure by action. However, title obtained through foreclosure by advertisement is less secure than that obtained through judicial foreclosure. Since foreclosure by advertisement does not provide for automatic judicial review of substantive or procedural defects regarding the mortgage and foreclosure, a mortgagor may challenge the foreclosure before or after the sale. A serious defect in the mortgage itself will result in a void foreclosure. A less serious procedural defect will render the sale voidable. See Minn. Stat. SS 582.01-.32 (1992).

The previous two foreclosures attempted by the Defendant were "foreclosures by advertisement". The first sale took place on April 18, 1988. The sale was pursuant to a power of sale clause in the mortgage. The second sale

took place on February 28, 1990 pursuant to the power of sale clause in the mortgage. The court did not order either sale. There were no judgments prior to either sale regarding the lien priorities or alleged defects in the mortgage. The court did not supervise the foreclosure sales. Thus, the foreclosures were "foreclosures by advertisement".

Subsequent to each sale, lawsuits were brought to determine the validity of each sale. The first foreclosure sale was voided by the court because an occupant of the property did not receive notice of the sale. In the lawsuit challenging the second sale, the trial court found for the mortgagee, but was reversed by the Court of Appeals. The Court of Appeals found that mortgagee had not given the mortgagor the proper restructuring notices required by the

Farm Credit Act. Thus, the second sale was voided.

In effect, the Plaintiffs allege the court involvement in voiding the foreclosure sales converts the "foreclosures by advertisement" into "foreclosures by action". This is erroneous. The court became involved for two reasons during the first foreclosure attempt: first, the mortgagee asked for an order substituting notice by publication for the regular notice requirements; second, the court became involved when the mortgagee commenced a declaratory judgment action to determine the validity of the foreclosure sale. This judicial involvement in no way resembles the service, pleadings, trial, judgment and sale that constitutes a "foreclosure by action". The same is true for the second sale. The court did

not become involved with the second foreclosure until after the sale when the mortgagor initiated a suit challenging the validity of the sale. Neither the first nor the second sale were the product of a "foreclosure by action". Both sales were the result of attempted "foreclosure by advertisement".

## II. APPLICABILITY OF RES JUDICATA

The Plaintiffs further claim that the prior actions were determined in favor of the Plaintiffs and that Defendant is forever barred from foreclosing the mortgage. Plaintiffs/mortgagors claim the principles of res judicata bar the mortgagee from foreclosing the mortgage.

Res judicata operates to bar certain claims from being asserted in subsequent litigation. Once a claim or cause of action has been asserted, the claimant is

precluded from asserting either that claim or another claim which could have been brought in the prior action, whether the claim was actually litigated or not. See Surf and Sand, Inc. v. Gardebring, 457 N.W.2d 782, 786 (Minn. Ct. App. 1990), rev. denied Sept. 20, 1990, citing Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209 (1979). The test is whether the subsequent suit arises from the same "operative nucleus of facts" as did the prior litigation. Anderson v. Werner Continental, Inc., 363 N.W.2d 332, 335 (Minn. Ct. App. 1985).

Res Judicata does not apply to this case. The suits challenging the validity of the prior two foreclosure sales do not bar the mortgagee from foreclosing a third time as Plaintiffs claim. The claims that were litigated in those cases involved the defects of the particular

sale being challenged. The present case revolves around an entirely new set of facts: those facts occurring with the third sale. There is no prior litigation regarding the third sale. Plus, Plaintiffs do not claim that the mortgage was adjudged to be invalid. The mortgage remains in default, and the mortgagee is still entitled to foreclose. Thus, the foreclosure sale is not barred because of res judicata.

Finally, Plaintiffs rely on the classification of at least one of the prior foreclosures as a "foreclosure by action". As previously discussed, the result of a "foreclosure by action" is a final judgment on the merits which bars any subsequent litigation on those issues. The cases Plaintiffs cite refer to "foreclosure by action" and do not apply to this case. Since neither of the

prior two sales were the result of "foreclosure by action", Plaintiffs' argument fails.

In fact, there is nothing barring a mortgagee from attempting a third foreclosure sale where the prior "foreclosure by advertisement" sales were voided due to procedural defects.

It was long ago definitely decided that void foreclosure sale will not prevent a second and valid foreclosure proceeding. The first attempt being null, and therefore amounting to nothing, imposes no obstacle to the second proceeding.

Bottineau v. Aetna Life Insurance Co., 16 N.W. 849, 31 Minn. 125 (1883).

> A void attempt to foreclose under the power (of sale) does not affect the mortgage, nor the right of the mortgagee to proceed and foreclosure anew, just as though the void attempt had not been made.

Cobb v. Bord, 42 N.W. 396, Minn. (1889).

According to the case law, Defendant was fully within its rights to hold a third

foreclosure sale.

Finally, Plaintiffs argue that the law of these cases does not apply to this case because the prior sales were not void, but voidable. A defective sale made by a "foreclosure by advertisement" is merely voidable, until adjudged void. The prior sales in this case were adjudged void and are considered void. The case law does not differentiate between a sale that was void from inception and one that was adjudged void.

## III. CONCLUSION

Plaintiff does not allege any dispute of fact. Since the only questions involved in Plaintiffs' claims are questions of law, summary judgment is proper.

Both of the prior foreclosures attempted by the Defendant were "foreclosures by advertisement", not

"foreclosures by action". "Foreclosure by action" and "foreclosure by advertisement" are two separate and distinct types of legal procedures used to foreclose a mortgage. Only a "foreclosure by action" results in a final judgment on the merits, barring any future litigation regarding the mortgage pursuant to the principle of res judicata. If a sale, which is the result of a "foreclosure by advertisement", is voided on procedural grounds, the mortgagee may foreclose again.

ADB